

**IDAPA 16 - DEPARTMENT OF HEALTH AND WELFARE**

**16.02.23 - INDOOR SMOKING**

**DOCKET NO. 16-0223-0401**

**NOTICE OF PROPOSED RULEMAKING**

**AUTHORITY:** In compliance with Section 67-5221(1), Idaho Code, notice is hereby given that this agency has initiated proposed rulemaking procedures. The action is authorized pursuant to Sections 39-5508, Idaho Code.

**PUBLIC HEARING SCHEDULE:** Public hearings concerning this rulemaking will be held as follows:

<b>Date:</b> Monday, August 9, 2004	<b>Wednesday, August 11, 2004</b>	<b>Thursday, August 12, 2004</b>
<b>Time:</b> 7:00 - 9:00 p.m.	<b>7:00 - 9:00 p.m.</b>	<b>7:00 - 9:00 p.m.</b>
<b>Place:</b> AmeriTel Spectrum 7499 West Overland Boise, ID	<b>AmeriTel - Coeur d'Alene</b> 333 Ironwood Ave Coeur d'Alene, ID	<b>Red Lion</b> 621 21st Street Lewiston, ID
<b>Date:</b> Tuesday, August 17, 2004	<b>Wednesday, August 18, 2004</b>	<b>Monday, August 23, 2004</b>
<b>Time:</b> 7:00 - 9:00 p.m.	<b>7:00 - 9:00 p.m.</b>	<b>7:00 - 9:00 p.m.</b>
<b>Place:</b> AmeriTel - Pocatello 1440 Bench Road Pocatello, ID	<b>AmeriTel - Idaho Falls</b> 645 Lindsey Idaho Falls, ID	<b>AmeriTel - Twin Falls</b> 1377 Blue Lakes Blvd. N. Twin Falls, ID

The hearing sites will be accessible to persons with disabilities. Requests for accommodation must be made no later than five (5) days prior to the hearing, to the agency address below.

**DESCRIPTIVE SUMMARY:** The following is a non-technical explanation of the substance and purpose of the proposed rule making:

The 2004 Legislature passed Senate Bill 1283 regulating smoking in public places in order to protect the public health and the health of employees who work at public places. These rules are being amended to conform to statutory changes.

The proposed rule text is in legislative format. Language the agency proposes to add is underlined. Language the agency proposes to delete is struck out. It is these additions and deletions to which the public comment should be addressed not to the legislation, SB 1283.

**NEGOTIATED RULEMAKING:** Pursuant to IDAPA 04.11.01.811, negotiated rulemaking was conducted by the Idaho Department of Health and Welfare by holding meetings and receiving input from legislators, law enforcement, legal representatives, business owners, regulatory authorities, associations for retailers, food and lodging, health care, and other interested stakeholders.

**ASSISTANCE ON TECHNICAL QUESTIONS, SUBMISSION OF WRITTEN COMMENTS:** For assistance on technical questions concerning the proposed rules, contact Elke Shaw-Tulloch at (208) 334-5950.

Anyone can submit written comments regarding this rulemaking. All written comments and data concerning the rule must be directed to the undersigned and delivered on or before August 25, 2004.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

SHERRI KOVACH  
Administrative Procedures Coordinator  
DHW – Administrative Procedures Section  
450 West State Street - 10th Floor  
P.O. Box 83720  
Boise, Idaho 83720-0036  
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### **16.02.23 - RULES GOVERNING INDOOR SMOKING**

#### **000. LEGAL AUTHORITY.**

The Director of the Idaho Department of Health and Welfare is authorized, ~~pursuant to~~ under Section 39-5508, Idaho Code, to adopt rules to implement ~~the provisions of~~ the Idaho Clean Indoor Air Act, Title 39, Chapter 55, Idaho Code. (1-1-86)(\_\_\_\_)

#### **001. TITLE AND PURPOSE.**

**01. Title.** These ~~rules are to be cited in full as Idaho Department of Health and Welfare Rules;~~ title of this chapter is IDAPA 16.02.23, "Rules Governing Indoor Smoking". (\_\_\_\_)

**02. Purpose.** The purpose of these rules is ~~to effectuate the intent of the Legislature~~ to protect the public health, comfort and environment, and the health of employees who work at public places, and the rights of nonsmokers to breathe clean air by ~~restricting~~ prohibiting smoking in public places and at public meetings ~~to designated smoking areas.~~ (1-1-86)(\_\_\_\_)

~~002. 049.~~ (Reserved).

#### **002. WRITTEN INTERPRETATIONS.**

The Department has no written interpretations that apply to rules in this chapter in accordance with Section 67-5201(19)(b)(iv), Idaho Code. (\_\_\_\_)

#### **003. ADMINISTRATIVE APPEALS.**

Administrative appeals for decisions made by the Department are governed by IDAPA 16.05.03, "Rules Governing Contested Case Proceedings and Declaratory Rulings." (\_\_\_\_)

#### **004. INCORPORATION BY REFERENCE.**

No documents have been incorporated by reference in this chapter of rules. (\_\_\_\_)

#### **005. OFFICE -- OFFICE HOURS -- MAILING ADDRESS -- STREET ADDRESS -- INTERNET WEBSITE.**

**01. Office Hours.** Office hours are 8 a.m. to 5 p.m., Mountain Time, Monday through Friday, except holidays designated by the State of Idaho. (\_\_\_\_)

**02. Mailing Address.** The mailing address for the business office is Idaho Department of Health and Welfare, P.O. Box 83720, Boise, Idaho 83720-0036. (\_\_\_\_)

**03. Street Address.** The business office of the Idaho Department of Health and Welfare is located at 450 West State Street, Boise, Idaho 83702. ( )

**04. Telephone.** (208) 334-6584 or (800) 445-8647. ( )

**05. Internet Websites And E-mail Address.** ( )

**a.** Department Internet address is: "http://www2.state.id.us/dhw/". ( )

**b.** Division Internet address is: "http://www.idahohealth.org". ( )

**c.** Bureau e-mail address is: "bceh@idhw.state.id.us". ( )

**006. CONFIDENTIALITY OF RECORDS AND PUBLIC RECORDS REQUESTS.**  
Any use or disclosure of Department records must comply with IDAPA 16.05.01, "Use and Disclosure of Department Records". ( )

**007. -- 009. (RESERVED).**

**0510. DEFINITIONS.**  
For the purpose of this chapter, the following terms ~~are used, as defined herein:~~ apply. (12-31-91)( )

**01. Act.** The Idaho Clean Indoor Air Act, Title 39, Chapter 55, Idaho Code. (1-1-86)

**02. ~~Arena And Auditoriums.~~** ~~Any room, hall or building used for public gatherings.~~ (1-1-86)

**03- Bar Within A Restaurant.** ~~Any establishment or portion of an establishment where the primary function is the serving and consuming of alcoholic beverages, excluding any establishment or portion of an establishment defined as a restaurant (Subsection 050.16). Alcoholic beverages include, but are not limited to, alcoholic liquor, beer and wine. A single establishment may contain both bar and restaurant portions, according to the primary function of each portion. A bar is considered to be "within a restaurant," if it does not meet all of the following requirements:~~ (12-31-91)( )

**a.** It must be physically isolated from all parts of the restaurant by solid floor to ceiling walls; ( )

**b.** It must have a separate outside public entrance that is not shared with the restaurant; ( )

**c.** It must not have any windows or doorways connecting it to the restaurant, either directly or through any indoor public place including lobbies, hallways or passageways that the public uses. The bar may be connected to the restaurant through kitchens, private offices, hallways or storerooms that are not available for public use; ( )

**d.** It must not be necessary for restaurant patrons to pass through the bar or any indoor public place connected to the bar to access restrooms or other facilities or accommodations of the restaurant; and ( )

**e.** No second hand smoke from the bar can impact the restaurant area. ( )

**043. Bowling Alley Or Center.** ~~Any establishment or portion thereof used for the recreation of bowling. A place of business with at least two bowling lanes on its premises and is operated for public entertainment.~~ (1-1-86)( )

**05- Bus.** ~~Any motor vehicle having a seating capacity of fifteen (15) or more passengers operated by a bus company for the purpose of carrying passengers or cargo for hire.~~ (11-15-87)

~~06. **Bus Company.** Any person, group, association, partnership or corporation providing, for hire, interstate or intrastate transportation by bus. This term includes cities, counties, districts, public corporations, boards and commissions established under the laws of this state providing transportation to passengers whether or not for hire.~~ (1-15-87)

~~07. **Charter.** A group of persons which has acquired, under a single contract and at a fixed rate, the exclusive use of a bus to travel together to a specified destination or destinations, or special excursions to one (1) specified destination.~~ (1-15-87)

**04. Department.** The Idaho Department of Health and Welfare. ( )

**085. Director.** The Director of the Idaho Department of Health and Welfare or his designee. (1-1-86)

**096. Educational Facility.** Any room, hall or building used for instruction, or supportive of instruction including: classrooms, libraries, auditoriums, gymnasiums, lounges, study areas, restrooms, halls, registration areas and bookstores of any private or public preschool, kindergarten, elementary school, junior high or intermediate school, high school, vocational school, college or university. ~~This term does not include offices assigned to faculty members or administrators.~~ (3-6-86)L( )

**07. Enclosed.** The space between a floor and ceiling which is designed to be surrounded on all sides at any time by solid walls, windows or similar structures, not including doors, that extend from the floor to the ceiling. ( )

~~10. **Elevator.** Any enclosed passenger area of a mechanical device which conveys persons to different levels of a building and is generally accessible to the public.~~ (1-1-86)

~~1108. **Grocery Stores And Stores Which Sell Food Primarily For Off Site Consumption.** Any establishment or portion thereof which that sells food at retail for off-site consumption and is required to be licensed under Idaho Department of Health and Welfare Rules, IDAPA 16.02.19, "Rules Governing Food Safety and Sanitation Standards For Food Establishments (UNICODE)".~~ (12-31-91)( )

~~1209. **Hospitals.** Any facility or portion thereof required to be licensed as a hospital under the Title 39, Chapter 13, Idaho Health Facilities Licensing Act Code.~~ (1-1-86)( )

**10. Incidental Service Of Food.** Incidental service of food is only serving food that is low-risk and non-potentially hazardous food as defined in IDAPA 16.02.19, "Rules Governing Food Safety and Sanitation Standards for Food Establishments". ( )

~~13. **Meeting Room.** Any room or hall directly or indirectly advertised and offered for short term lease or rent to the public for the primary purpose of providing space for meetings. This term shall not include private social functions.~~ (3-6-86)L

~~14. **Nursing Home.** Any facility or portion thereof required to be licensed as a nursing home under the Idaho Health Facilities Licensing Act.~~ (1-1-86)

~~15. **Private Social Function.** An entire room or hall used for a private social function when seating arrangements are under the control of the sponsor of the function and not the proprietor or person in charge of the place.~~ (3-6-86)L

**161. Proprietor Or Person In Charge.** Any person, or agent of such person, who ultimately controls, governs or directs the activities within the public place. The term does not mean the owner of the property unless he ultimately governs, controls or directs the activities within the public place. (1-1-86)

**172. Public Conveyance Means Of Mass Transportation.** Any air, land or water vehicle used for the transportation of persons for compensation including, ~~but not limited to,~~ airplanes, trains, buses, boats and taxis. ~~The term does not include conveyances which may be used to transport employees during work.~~ The term does not include private, noncommercial vehicles. (1-1-86)( )

~~18. **Public Meeting.** Any meeting open to the public, including any meeting open to the public without specific invitation or permission. (1-1-86)~~

~~19. **Public Place.** Any enclosed indoor area used by the general public. An area used by the general public is an area where the public can freely enter and move about without specific invitation, permission or appointment, regardless of ownership of the area. The sale of tickets for entry is not considered a specific invitation. The term includes, but is not limited to, enclosed indoor restaurants, retail stores, grocery stores and stores which sell food primarily for off-site consumption, public conveyances, educational facilities, hospitals, nursing homes, auditoriums, arenas and meeting rooms. (1-1-86)~~

~~20. **Restaurants.** Any establishment or portion of an establishment with a seating capacity of thirty (30) or more customers where the primary function is the serving and consuming of meals and any alcoholic beverages incidental thereto, excluding any establishment or portion of an establishment defined as a bar (see IDAPA 16.02.21, Subsection 050.03). A single establishment may contain both restaurant and bar portions according to the primary function of each portion. An establishment or a portion of an establishment may change from a restaurant to a bar, or from a bar to a restaurant, according to the primary function of such an establishment or portion thereof. (12-31-91)~~

~~21. **Retail Stores.** Any store selling goods directly to the public. (1-1-86)~~

~~22. **Shopping Mall Concourse.** Any enclosed indoor passageway with a width of at least twenty-five (25) feet and a ceiling height of at least fifteen (15) feet which is primarily used for pedestrian access to rows of adjoining retail stores and other public places. The term does not include theater ticket areas, restrooms, smaller passageways or adjoining retail stores and other public places. (1-1-86)~~

~~23. **Smokeshops.** Any retail store primarily engaged in the selling of tobacco products and smoking appliances. (1-1-86)~~

~~24. **Smoking.** Carrying a lighted cigar, cigarette, pipe or any other matter or substance which contains tobacco or any other lighted smoking appliance. (1-1-86)~~

~~14. **Tobacco Products.** Any substance that contains tobacco including, cigarettes, cigars, pipes, snuff, smoking tobacco, tobacco paper or smokeless tobacco. It will be presumed that a lighted cigarette, cigar or pipe contains tobacco. ( )~~

~~0511. -- 099. (RESERVED).~~

**100. Smoking Prohibited Smoking Status Of Bar Establishments.**

~~No person shall smoke in a public place or at a public meeting except in designated smoking areas. No person shall smoke in an elevator or a nonchartered bus. (11-15-87)~~

~~01. **Smoking Status.** Proprietors must designate the smoking status of their bar establishment. ( )~~

~~02. **Designation As A Non-Smoking Bar.** When the proprietor designates that the bar is a non-smoking establishment, smoking is prohibited by anyone at any time. See Section 200 of these rules for appropriate sign requirements. ( )~~

~~03. **Designation As A Smoking Bar.** When the proprietor designates that the bar is a smoking establishment, smoking is allowed at any time. See Section 200 of these rules for appropriate sign requirements. ( )~~

~~04. **Bar Establishments That Have Dual Designations.** When a proprietor allows smoking for a portion of the time and not at other times, signs must be posted announcing the times that smoking is allowed. See Section 200 of these rules for appropriate sign requirements. ( )~~

~~101. -- 1499. (RESERVED).~~

**150. ~~Designated Smoking Area.~~**

**~~01. Designation In General.~~** ~~Smoking areas in public places may be designated by proprietors or other persons in charge of public places by the posting of appropriate signs in accordance with these rules.~~ (1-1-86)

**~~02. Areas Which May Be Designated In Their Entirety.~~** ~~Private social functions, bars, bowling alleys, smokesops, shopping mall concourses, and taxicabs may be designated as smoking areas in their entirety.~~ (1-1-86)

**~~03. Areas Which May Not Be Designated.~~** ~~The following areas may not be designated as smoking areas:~~ (1-1-86)

**~~a.~~** ~~The entirety of a public place or a public meeting, except as provided in Subsection 150.02.~~ (12-31-91)

**~~b.~~** ~~Any portion of entry or exit areas, ticket areas, registration areas, restrooms, corridors, hallways and similar areas of a public place if nonsmokers would reasonably be required to utilize such portion.~~ (1-1-86)

**~~c.~~** ~~Any elevator generally accessible to the public.~~ (1-1-86)

**~~d.~~** ~~Any portion of a public conveyance with a capacity of less than fifteen (15) persons, except as provided in Subsection 150.02.~~ (12-31-91)

**~~04. Minimizing The Effects Of Smoke.~~** ~~Where smoking areas are designated, a good faith effort shall be made by the proprietor or other person in charge to minimize the effect of smoke in adjacent nonsmoking areas.~~ (3-6-86)L

**~~151.—199. (Reserved).~~**

**200. POSTING OF SIGNS ~~Designating Smoking And Nonsmoking Areas.~~**

**~~01. Responsibility Of Proprietor.~~** ~~The proprietor or other person in charge of a public place shall make reasonable efforts to prevent smoking in a public place by posting appropriate signs designating smoking and nonsmoking areas. The posting of appropriate signs is required to designate smoking areas.~~ (1-1-86)

**~~02. Posting Of Appropriate Signs.~~** (1-1-86)

**~~a.~~** ~~Public places which are designated smoking areas in their entirety shall be posted with a sign at each entrance which includes the statement, "This establishment is a smoking area" or a similar statement.~~ (1-1-86)

**~~b.~~** ~~Public places or public meetings which are not designated smoking areas in any part shall be posted with a sign at each entrance which includes the statement, "This establishment is a no smoking area" or a similar statement.~~ (1-1-86)

**~~c.~~** ~~Entire rooms within a public place that are designated smoking areas shall be posted with a sign at each entrance to the room or inside the room which includes the statement, "This room is a smoking area" or a similar statement.~~ (1-1-86)

**~~d.~~** ~~Entire rooms within a public place that are not designated smoking areas in any part shall be posted with a sign at each entrance to the room or inside the room which includes the statement, "This is a no smoking area" or a similar statement.~~ (1-1-86)

**~~e.~~** ~~Any portion of a room within a public place that is a designated smoking area shall be posted with a sign which includes the statement, "Smoking permitted in this area" or a similar statement.~~ (1-1-86)

**~~f.~~** ~~Any portion of a room within a public place that is not a designated smoking area shall be posted~~

with a sign which includes the statement, "No smoking in this area" or a similar statement. (1-1-86)

~~g.~~ Restaurants or other public places which have controlled seating (an employee directs patrons to seating or waiting areas) in which all patrons are directed or escorted to designated smoking areas or no smoking areas according to each patron's seated preference, may utilize a single sign at the entrance or waiting area which advises the public of the controlled seating mechanism and includes the statement, "Both smoking and no smoking areas are available, according to patron preference" or a similar statement. A restaurant or other public place which has controlled seating and posts the appropriate sign shall not be required to post those signs required by Subsections 200.02.a. through 200.02.f. (12-31-91)

~~h.~~ Each entry, exit, ticket and registration area, restroom, corridor, hallway and any similar area shall be posted with a sign which includes the statement, "No Smoking" or a similar statement in any public place which has both designated smoking areas and no smoking areas. (1-1-86)

~~i.~~ Each elevator generally accessible to the public shall be posted with a sign in the enclosed passenger area and each entrance to the elevator or bank of elevators which includes the statement, "No Smoking" or a similar statement. (1-1-86)

~~03. Sign Location, Size, Visibility.~~ Signs ~~shall~~ must be appropriately sized, conspicuous, legible, unobscured, and placed at a height and location ~~so as to be~~ easily seen and read by persons entering or within the posted area. Signs may contain information ~~in addition to the required statement~~, such as the international smoking and no smoking symbols and references to the Idaho Clean Indoor Air Act, Title 39, Chapter 55, Idaho Code ~~or the Act. The additional information shall not obscure the required statement.~~ The letters on the signs must be at least one (1) inch in height. (12-31-91)( )

01. Bar Establishment With Smoking. A sign for a bar establishment that allows smoking must state, "Smoking Permitted; No one under age twenty-one (21) permitted." All public entrances must be clearly posted with a sign warning patrons. ( )

02. Bar Establishment With Dual Designation. A sign for an establishment with dual designation must state, "Smoking Permitted; No one under age twenty-one (21) permitted," and the hours the establishment is a smoking establishment. All public entrances must be clearly posted with a sign warning patrons. ( )

03. Designated Smoking Areas. A sign for a designated smoking area as defined in Section 3955-03, Idaho Code, must state "Warning: Smoking Permitted." ( )

~~201. — 249. (Reserved).~~

~~250. Waivers.~~

~~01. Application And Fee.~~ To apply for a waiver of the requirements of these rules, the proprietor or other person in charge of a public place shall complete and submit an application (attached as Appendix A of these rules) and a ten dollar (\$10) service fee to the Director, stating the grounds for the requested waiver. The Director has the right to request any other information reasonably necessary to determine the merits of the waiver application. Failure to submit such requested information may result in denial of the waiver. The application shall be addressed and mailed or delivered to:

Smoking Waivers  
Idaho Department of Health and Welfare  
Bureau of Preventive Medicine  
The Towers — 450 West State Street  
Boise, ID 83720-0036

(12-31-91)

~~02. Burden On Applicant.~~ An applicant for waiver shall have the burden to provide clear and convincing evidence to demonstrate that compelling reasons exist to issue the waiver and that the health and comfort of nonsmokers will not be significantly affected. Evidence that the health and comfort of nonsmokers will not be

~~significantly affected may include a showing that either nonsmokers do not use the public place or constitute a very small proportion of the users of the public place or that some extraordinary means of minimizing the effects of smoke on nonsmokers exist in the public place, such as an extraordinary ventilation or a filtration system.~~ (1-1-86)

~~03. **Factors To Be Considered.** In considering the waiver application, the Director shall consider the information supplied in the application, the prevailing smoking restrictions and other practices related to similar public places in the community and other relevant information consistent with the public policy expressed in the Act.~~ (12-31-91)

~~04. **Decision.** The Director shall make a decision within a reasonable time and shall respond in writing to the applicant, indicating that the waiver application has been approved or denied and the reasons therefore. Any person aggrieved by the decision of the Director shall be afforded an opportunity for a hearing upon request therefore in writing pursuant to Idaho Department of Health and Welfare Rules, IDAPA 16.05.03, Sections 000, et seq., "Rules Governing Contested Case and Declaratory Rulings".~~ (12-31-91)

~~2501. -- 299.~~ (RESERVED).

### 300. VIOLATIONS AND PENALTIES.

Any person who violates any provision of these rules is subject to the penalty provided in Section 39-5507, Idaho Code. (1-1-86)(\_\_\_\_)

01. **Responsibility Of Employer.** No employer or other person in charge of a public place or publicly-owned building or office will knowingly or intentionally permit the smoking of tobacco products in violation of this chapter. (\_\_\_\_)

02. **Employer Fined For Violation.** Any employer or other person in charge of a public place or publicly-owned building or office who knowingly violates the provisions of this chapter of rule is guilty of an infraction and is subject to a fine, not to exceed one hundred dollars (\$100). (\_\_\_\_)

03. **Employer Who Discriminates Against An Employee.** Any employer who discharges or in any manner discriminates against an employee because that employee has made a complaint or has given information to the Department of Health and Welfare or the Department of Labor under this chapter of rule or Section 39-5507, Idaho Code, will be subject to a civil penalty of not less than one thousand dollars (\$1,000) nor more than five thousand dollars (\$5,000) for each violation. (\_\_\_\_)

04. **Employer Responsible To Request Person To Stop Smoking.** An employer, or other person in charge of a public place or publicly-owned building or his employee or agent, who observes a person smoking in apparent violation of the Idaho Clean Indoor Air Act, Title 39, Chapter 55, Idaho Code, must ask the person to extinguish all lighted tobacco products. (\_\_\_\_)

05. **Smoker's Refusal To Comply.** Any person who refuses to either extinguish the lighted tobacco product or leave the premises is guilty of an infraction and is subject to a fine not to exceed fifty dollars (\$50). (\_\_\_\_)

06. **Violations Reported To Law Enforcement.** Any violation identified in Subsections 300.02, 300.04, and 300.05 of these rules may be reported to law enforcement. (\_\_\_\_)

~~301. -- 9959.~~ (RESERVED).

### ~~996. **Administrative Provisions.**~~

~~Contested case appeals shall be governed by Idaho Department of Health and Welfare Rules, IDAPA 16.05.03, Sections 000, et seq., "Rules Governing Contested Case Proceedings and Declaratory Rulings".~~ (12-31-91)

### ~~997. **Confidentiality Of Records.**~~

~~Any disclosure of information obtained by the Department is subject to the restrictions contained in Idaho Department of Health and Welfare Rules, IDAPA 16.05.01, "Use and Disclosure of Department Records".~~ (12-31-91)



**998. ~~Inclusive Gender.~~**

~~As used in these rules, the masculine, feminine, or neuter gender, and the singular or plural number, will each be deemed to include the others whenever the context so requires.~~ (1-1-86)

**999. ~~Severability.~~**

~~Idaho Department of Health and Welfare Rules, IDAPA 16.02.23, "Rules Governing Indoor Smoking," are severable. If any rule, or part thereof, or the application of such rule to any person or circumstance, is declared invalid, that invalidity does not affect the validity of any remaining portion of the chapter.~~ (1-1-86)